United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2158 B Pgs 65

United States Court of Appeals

For the Second Circuit

JANET GOTKIN and PAUL GOTKIN, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—against—

ALAN D. MILLER, individually and as Commissioner of Mental Hygiene of the State of New York, MORTON B. WALLACH, individually and as Director of Brooklyn State Hospital, CHARLES J. RABINER, individually and as Director of Hillside Medical Center, and MARVIN LIPKOWITZ, individually and as Director of Gracie Square Hospital,

Defendants-Appellees.

On Appeal From the United States District Court
for the Eastern District of New York

REPLY BRIEF FOR APPELLANTS

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December 18, 1974

Clerk of the Court
United States Court of Appeals
Second Circuit
Foley Square
New York, New York

Re: Gotkin v. Miller
Index No. 74-2138

Dear Sir:

Our office filed yesterday Reply Brief for Appellants in the above-named case. On page 1 of that brief, the District Court's decision was erroneously reported at 374 F.Supp. 859 (E.D.N.Y., 1974). The correct citation is 379 F.Supp. 859 (E.D.N.Y., 1974).

We are sorry for any confusion that this typographical error caused the Court or counsel for appellees.

Sincerely yours,

Chris Hansen

Chris Hansen

ds
cc: Maria L. Marcus, Esq.
Stephen J. Stein, Esq.
Melvyn B. Ruskin, Esq.
Robert Conrad, Esq.

Washington, D.C. Office: 1751 N St. N.W., Washington, D. C. 20036, (202) 872-0670. Paul R. Friedman, Managing Attorney; Charles R. Halpern, Lawrence H. Schwartz, Edward P. Scott, Patricia M. Wald, Attorneys.

Sponsored by American Civil Liberties Union Foundation, American Orthopsychiatric Association and the Center for Law and Social Policy.

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UNITED STATES COURT OF APPEALS

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REPLY BRIEF FOR APPELLANTS

Introduction

The decision by the District Court, A72-A97, is now reported at 374 F.Supp. 859 (E.D.N.Y., 1974).

There are two separate and basic questions in this case which the hospitals (appellees) have confused.

First, does Janet Gotkin (appellant) have a right of access to her own records? In other words, may the hospitals deny her all access to all portions of her own hospital records arbitrarily, even under circumstances where the hospitals would concede that they had no reason to deny such access. The Constitution and New York State law are clear on this question. Janet Gotkin does have a property right of access to her own hospital records, at least in some circumstances. See Brief for Appellants, pp. 11-41, and section 1 herein.

The hospitals argue that she has no such right. See Brief for Defendants-Appellees Charles J. Rabiner and Long Island Jewish-Hillside Medical Center, pp. 6-28. Yet, recognizing the injustice of such a position, they adopt an alternative position. They argue that there are some circumstances under which Janet Gotkin is not entitled to all portions of her hospital record and that they have adopted a medical screening mechanism to identify those circumstances. But to argue that there are some circumstances under which Janet Gotkin is not entitled to access is also to argue that

there are some circumstances under which she is entitled to access.

If the hospitals are not conceding her right of access in some circumstances, then the medical screening mechanism and the policy arguments on which it is based are irrelevant. If, after all, she has no "legitimate claim of entitlement" under any circumstances, then the hospitals may revoke the medical screening mechanism at any time and deny Janet Gotkin or other members of the class any access--even partial and indirect--to their own records. Similarly (if she has no "legitimate claim of entitlement" under any circumstances), the policy arguments raised by amicus curiae are irrelevant since the hospitals are then free to deny her access for any reason. They need not find good reasons for such a denial.

In short, in advocating a medical screening mechanism, and in requesting that amicus curiae file a brief which argues that there might be circumstances under which denial of access is just, the hospitals have , in effect, conceded that their legal argument (that Janet Gotkin has absolutely no right of access) is both weak and unjust.

If then, the second question--who will decide when Janet Gotkin will be deprived of her constitutional right of access to her own hospital records, and under

what circumstances--is the real question before this Court, then this case must be remanded. In order to discover what mechanism is required by the due process clause, the District Court must weigh the interests involved. A comparison of the Brief for Appellants, pp. 53-64, and the Brief of the Hospital Association of New York State, Amicus Curiae, reveals that the interests involved are sharply in dispute. Appellants expect to be able to prove that the fears raised by amicus curiae concerning the consequences of Janet Gotkin's access to her own records are essentially without substance. That showing can only be made through presentation of expert testimony to the trial court. Thus, because there are "genuine issue(s) as to...material fact(s),"* summary judgment was inappropriate.

I. THE HOSPITALS' REFUSAL TO GIVE JANET GOTKIN ACCESS TO HER RECORDS DEPRIVES HER OF PROPERTY AND LIBERTY WITHOUT DUE PROCESS OF LAW.

A. Janet Gotkin Has a Property Right of Access to Her Own Records.

In order to ascertain whether or not Janet Gotkin has a property right of access to her own hospital records, this Court must look to state law and to other

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*F.R.C.P., Rule 56(c)

sources to determine the meaning of"property."* Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Thus, appellants have cited cases from other jurisdictions. See Appellants' brief, p. 19.

Appellants have cited nine New York cases which hold that there is a common law right of a patient of access to his or her own records (and five holding that under New York law, subjects of confidential records are entitled to access to such records). Brief for Appellants, pp.14-18. Six of those cases are decisions of the Supreme Court of New York, a court of general jurisdiction: Sosa v. Lincoln Hospital, 190 Misc. 448, 74 N.Y.S. 2d 184 (Sup.Ct., 1947); Van Allen v. McCleary, 211 N.Y.S.2d 501 (Sup.Ct.,Nassau, 1961); In re Greenberg's Estate, 196 Misc. 809, 89 N.Y.S.2d 807 (Sup.Ct., 1949); Glazer v. Department of Hospitals of City of New York, 155 N.Y.S.2d 414 (Sup.Ct., King's Co., 1956); Hoyt v. Cornwall Hospital, 169 Misc. 361, 6 N.Y.S.2d 1014 (Sup.Ct., 1938); Application of Weiss, 208 Misc. 1010, 147 N.Y.S.2d 455 (Sup. Ct., 1955). One of those cases, Sosa v. Lincoln Hospital, supra, was affirmed by the Appellate Division, 273 App.Div. 852, 77 N.Y.S.2d 138 (1st Dept, 1948). Three are cases from the New York Court of Claims. Thomas v. State, 94 N.Y.S. 2d 770, 197 Misc. 288 (Ct.Cl., 1950);

*However, even if this Court looks only to New York State law, it will find there a clear indication that Janet Gotkin has a right of access to her own records.

Application of Warrington, 105 N.Y.S.2d 925 (Ct.Cl., 1950) aff., 303 N.Y. 129 (1951);Montgomery v. State, 69 Misc.2d 127, 328 N.Y.S. 2d189, aff. 43 App.Div. 2d 552, 349 N.Y.S. 2d 119, app. dism. 33 N.Y. 2d 1008, 353 N.Y.S. 2d 967, 309 N.E.2d 429 (1972). In response, the hospitals have cited only one case holding that a patient has only an indirect right of access to his or her own records, a case from one Erie County Surrogate's Court, a court of limited jurisdiction. In re Culbertson's Will, 57 Misc.2d 391, 292 N.Y.S.2d 806 (Surr. Ct., Erie Co., 1968).

The hospitals distinguish five of the cases cited by appellants (Greenberg, Glazer, Thomas, Hoyt, and Weiss) on the grounds that patients have a total right of access to their entire record only if they invoke the magical words "I might want to sue you."* Yet, two of those cases were not "discovery" cases since no lawsuit had been filed(Hoyt v. Cornwall Hospital, supra, and Application of Weiss, supra).

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* It is interesting to note that fears concerning the consequences of disclosure raised by the hospitals and amicus curiae are not raised in this context. If the hospitals are really concerned that disclosure to Janet Gotkin of material in her own records will cause her to suffer emotional harm, that concern should be no less powerful simply because she wants to see the records in order to sue them. In acknowledging her right to her record, at least in a litigation context, the hospitals concede, in effect, that their fears about disclosure are at best speculative and at worst, without substance.

More importantly, the New York Supreme Court has said that those cases are not merely limited to the facts, but imply as well a recognition of the "common law right of a patient to inspect his own hospital records." Van Allen v. McCleary, supra. Yet the hospitals would have this Court adopt their interpretation in determining what New York law is--an interpretation supported only by the Surrogate's Court, a court of limited jurisdiction--and would have the Court reject that of the Supreme Court, a court of general jurisdiction.

The Van Allen interpretation of New York law is further supported by three holdings of the New York Court of Claims (Thomas v. State, supra, Application of Warrington, supra, and Montgomery v. State, supra). Two of those cases, Warrington and Montgomery, were clearly not "discovery" cases, since no suit had been filed. Moreover, the Court of Claims is a court of limited jurisdiction, its jurisdiction limited to returning to citizens property taken by the state. It does not have jurisdiction to order hospitals to grant a patient access to his or her own records unless it has found that the patient has a property right to access to those records. See Brief for Appellants, pp. 17-18, ff. The hospitals, unable to distinguish or explain away these clear holdings of the right of patients of access to their own records, ignore these cases entirely.

In attempting to distinguish Sosa, the hospitals apparently concede that Janet Gotkin would have a constitutional right of access to her records if she had been hospitalized in a city hospital. Surely that interpretation of the Sosa case raises serious equal protection problems. Additionally, the hospitals have held that Sosa was a unique holding based directly on the Court's reading of the City Charter. Yet the Court in Sosa could not have granted access based on an interpretation that the New York City Charter declares all hospital records to be public records; section 352 of the Civil Practice Act (now C.P.L.R. §4504) and §19 of the Mental Hygiene Law (ow §15.13) expressly make such records confidential. The only reasonable interpretation of Sosa is that Justice Corcoran was looking to the New York City Charter as one source of "existing rules or understandings" which define property for the Fourteenth Amendment. Board of Regents v. Roth, supra. And the finding of Justice Corcoran was that under New York law, the patients had the "legitimate claim of entitlement" required by the Fourteenth Amendment.

Finally, the hospitals argue that "it is undisputed

that these records...have been in the exclusive possession and control of the defendants," Brief for Defendants-Appellees Charles J. Rabiner and Long Island Jewish-Hillside Medical Center, p. 17, and that "while an owner may have the right to exclude others, the existence of the right to exclude does not make one an owner." Id. As the latter point makes obvious, the Gotkins have disputed that the records have been in the exclusive "control of the defendants." Indeed, the undisputed fact is that Janet Gotkin has more control over these records than do the hospitals.* And while logic may not compel the conclusion that the right to exclude others makes one an owner, the unrefuted and indisputable New York law is that, absent exceptional circumstances, the right to exclude others implies all of the other incidents of ownership and ownership itself. Brief for Appellants, p. 28.

In short, the hospitals' attempt to distinguish, explain away, and even ignore New York law cannot obscure the basic substance of that law. Janet Gotkin has a property right of access to her own hospital records.

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*See Brief for Appellants, pp. 25-26.

B. Janet Gotkin Has Been Deprived of Her Right to Liberty Without Due Process By the Refusal of the Hospitals To Grant Her Access to Her Hospital Records.

The hospitals argue that they have not "attempted ...to affect her [Janet Gotkin's] reputation adversely." Brief for State Appellees, p. 5. Yet, even in that same brief, the hospitals attach the label "mental patient" to Janet Gotkin. Id., p.4. As this Court has said, that label is stigmatizing. Lombard v. Board of Education, No. 73-2057 (July 22, 1974). Where such a label is attached, the victim of such stigma is entitled to a hearing. Id.

In addition, because the hospitals insist on referring to Janet Gotkin as a "mental patient," they raise the spectre of mental breakdown as a consequence of her access to her own records. Brief of Amicus Curiae, Point IA, pp. 9-20. They can cite no evidence to support such a speculative fear and apparently have not looked at Janet Gotkin's records to see if disclosure would have such an effect on her.

Most importantly, the hospitals ignore completely the fact that Janet Gotkin is not a "mental patient." She is not now receiving treatment of any kind for mental illness. Under New York law, she is as competent as counsel for the

hospitals or the doctors at the hospitals. Brief for Appellants, p. 31. Yet, in refusing her access to her own records because she is a "mental patient" and therefore there is a chance that she might suffer emotional harm upon reading her records, the hospitals take the incredible position that anyone who has ever been to a psychiatrist is forever a "mental patient" and emotional cripple. It is ironic that the very professionals who should be demythologizing mental illness have taken that position in this litigation, a position which is professionally indefensible.

Janet Gotkin is a competent, adult woman. Though she once received services for mental illness, she is not now a "mental patient" and the only evidence of her emotional stability or instability is the uncontradicted allegations of the Complaint that her emotional condition is excellent. A-3. Yet, the hospitals assert that she is "mentally ill" and refuse her access to her own records on that basis. They have thus deprived her of the liberty guaranteed by the Fourteenth Amendment and she is entitled to a hearing.* In order to determine the elements of that hearing that are required by the Fourteenth Amendment, this Court should remand this case to the District Court for a weighing of the relative interests involved.

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* Lombard, supra.

II. THE COURT SHOULD REMAND THIS CASE FOR A RESOLUTION OF THE STATE ACTION QUESTION.

A. The State Action Question is Prematurely Raised.

The District Court expressly refused to decide whether the actions of Drs. Rabiner and Lipkowitz constituted state action. A-96. Despite that refusal, that issue has been fully briefed by Drs. Rabiner and Lipkowitz in this Court. There are several reasons why this Court should not decide the state action issue now.

First of all, the issue is not properly before this Court. There is no decision to affirm or reverse. 28 U.S.C.A. §§1291, 2106; Helvering v. Hormel, 111F.2d, aff. 312 U.S. 552, 85 L.Ed 1037 (1940).

Secondly, as Dr. Lipkowitz notes, the question of state action by hospitals such as Gracie Square and Hillside is due to be decided by this Court in Barrett v. United Hospital, 376 F.Supp. 791 (May, 1974), currently sub judice. Certainly, the resolution of the legal issues raised herein will be aided by that decision and it can be considered by the District Court after remand.

Finally, the state action question cannot be resolved until all of the facts have been determined. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Supreme Court ruled that "readily applicable formulae may not be fashioned" and that the existence or non-existence of state action "can be determined only in the framework of the peculiar facts or circumstances present" in each case (365 U. S. at 725, 726).

The importance of the individual facts was emphasized again in Reitman v. Mulkey, 387 U.S 369, 378 (1967):

> This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations. "only by sifting facts and weighing circumstances" on a case-by-case basis can a "non-obvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 6L.Ed.2d 45, 50, 81 S Ct. 856.

More recently, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) the Supreme Court reaffirmed Burton's and Reitman's insistence on a careful sifting of the facts:

> While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "state action," on the other hand, frequently admits of no easy answer. "only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, supra, at 722, 6L.Ed. 2d at 50.

If determination of the existence or non-existence of state action requires a careful sifting of the particular facts of each case, as the Supreme Court has commanded, it follows that this case should be remanded for a determination of the facts before those issues are resolved. Illustrative of this proposition if Coleman v. Wagner College, 429 F. 2d 1120 (2d Cir. 1970), a case originating in this Court. In Coleman, Chief Judge Kaufman ruled that the existence of non-existence of state action should not be determined on the basis of a sketchy and incomplete record:

> Since we cannot resolve this question on the record before us, we conclude that the district court acted too hastily in dismissing the complaint and, consequently, remand for a further hearing at which the plaintiffs may introduce evidence to establish that section 6450 represents a

meaningful state intrusion into the disciplinary policies of private colleges and universities." (429 R.2d at 1125).*

The two hospitals which raise the state action issue in this case may differ in their involvement with state funding and programs. For example, Dr. Rabiner's hospital apparently receives Hill-Burton funds; apparently Dr. Lipkowitz's does not. It is likely that there are other differences which have not been adequately explored. In short, the record is incomplete on the state action questions and therefore this court should remand this case to a lower court for a full exploration of the facts.

B. Even The Incomplete Record Before The Court Shows Substantial State Involvement In The Manner In Which "Private" Hospitals Compile And Disseminate Patient Records.

Appellants will show in this subsection that Drs. Lipkowitz (Gracie Square) and Rabiner (Hillside) are

* See also Braden v. University of Pittsburgh, 477 F.2d 1 (3rd Cir. 1973). The district court granted a motion to dismiss for failure to establish state action. The Circuit Court, noting that "the Supreme Court has repeatedly informed us that such difficult issues should not be decided except upon a full record and after adequate hearing," vacated and remanded for "a carefully prepared record after full hearing" (477 F 2d at 4-5,8).

required by state law (a) to compile and maintain the very records plaintiffs wish to inspect, and (b) to safeguard the confidentiality of those records and to permit access only to authorized persons (14 NYCRR 82.8). In other words, defendants could not lawfully decide, as a matter of "internal policy," not to compile or maintain patient records, and could not lawfully decide to allow unlimited access to patient records.

Before discussing the specific state involvement in the maintenance and dissemination of patient records, however, it is appropriate to discuss the general state involvement in the operation of mental hospitals. It is appropriate first, because many courts have indicated that massive general state involvement may, in some circumstances, constitute state action even absent specific state involvement in the challenged act.* And it is appropriate, second, because many courts have indicated that state action may be found in the very fact that the "private" party is performing functions peculiarly public in nature, functions that have traditionally been performed, or extensively

* E.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972).

regulated, by the state.*

We can begin with the Constitution of the State of New York, which provides (Article 17, §4):

> The care and treatment of persons suffering from mental disorder or defect and the protection of the mental health of the inhabitants of the state may be provided by state and local authorities and in such manner as the legislature may from time to time determine. The head of the department of mental hygiene shall visit and inspect, or cause to be visited

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* E.g., Coleman v. Wagner College, 429 F.2d 1120, 1121 (2nd Cir. 1970): "A not uncommon method of establishing the presence of state action is to show that a private organization has undertaken to perform functions peculiarly 'public' in nature and traditionally entrusted to the state." See also Seidenberg v. McSorleys' Old Ale House, Inc., 317 F.Supp. 593, 604 (SDNY, 1970) (Mansfield, J.), finding the licensing and pervasive regulation of private taverns, "an area peculiarly subject to state regulation," to constitute state action. For a similar ruling by Judge Tenney during an earlier phase of the case, see 308 F.Supp. 1253 (SDNY, 1969). And see Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S 649 (1944). Magro v. Lentini Bros. Moving and Storage Co., 338 F.Supp. 464, 466 note 7 (EDNY,1971) (Chief Judge Mishler), aff'd, 460 F.2d 1964 (2d Cir.), cert. den., 32 L Ed.2d 349 (1972): "The last three decades have seen the emergence of another theory of state action, more pertinent to the problem here under discussion. According to this doctrine, private persons, when performing traditionally public functions, become liable under §1983" United States v. Barr, 295 F.Supp. 889 (SDNY 1969) and the cases cited therein. And in United States v. Wiseman, 445 F.2d 792 (2d Cir. 1971), the Second Circuit applied the "public function theory" and ruled that the activity of process serving, "even when performed by a private party" who received no state funds, and was not regulated by the State, "constitutes State action under that theory" (445 F.2d at 795-796).

> and inspected by members of his staff, all institutions either public or private used for the care and treatment of persons suffering from mental disorder or defect.

Thus, the state constitution requires substantial state involvement with "all [psychiatric] institutions either public or private."

Pursuant to this constitutional provision, mentally disordered persons in both public and private facilities have always been considered "wards of the state."

In Sporza v. German Savings Bank, 192 N.Y. 8 (1908), the Court of Appeals ruled that "jurisdiction is inherent in the state over unfortunate persons within its limits who are idiots or have been deprived of the use of their mental faculties....In England, whence our law respecting idiots and lunatics is derived, the custody and care of such persons and their property are part of the prerogative of the sovereign." (192 N Y. at 14) (emphasis added). In 1842 the legislature established a "state lunatic asylum"* and in 1874 the legislature authorized "commitment of persons to public and private asylums" (192 N.Y. at 18).

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* Accordingly, state involvement in providing mental health care is approximately as old, and perhaps older, as state involvement in providing education.

More recently, in Kesselbrenner v. Anonymous, 33 N Y 2d 161, 350 N Y.S. 2d 889 (1973), the Court of Appeals, citing the state constitution and the current Mental Hygiene Law, ruled unanimously that "the State is responsible" for the care and treatment of the mentally ill, and ruled that the state Department of Mental Hygiene is required by §7.05 (c) of the Mental Hygiene Law to ensure that "personal and civil rights of persons receiving care and treatment are adequately protected" (350 N.Y.S. 2d at 893).

We can look next at state statutes. Article 13 of the Mental Hygiene Law extensively regulates "private" psychiatric hospitals and provides that "no provider of services" (which is defined in MHL §1.05 (5) to include "private" agencies) shall operate "a residential facility" for the care and treatment of the mentally disabled "without an operating certificate issued by the Commissioner" of Mental Hygiene, Dr. Miller (MHL §13.01 (a)). In short, without a certificate from the state, Drs. Lipkowitz (Gracie Square) and Rabiner (Hillside) would be out of business. Furthermore, the statute requires that they operate their facilities "in accordance with the terms of

the operating certificate and the regulations of the Commissioner" (MHL §13.01 (b)) (emphasis added).

Dr. Miller is given almost unlimited power to regulate "private" psychiatric hospitals (MHL §13.03 (a)), and is specifically authorized to issue regulations governing patient "records" (MHL §13.03 (a) (2)). The remaining sections of Article 13 give the Commissioner extensive authority to disapprove, limit or modify operating certificates, to investigate "the operations of providers of services," to determine whether providers of services are complying with the Mental Hygiene Law and with "applicable laws, rules, and regulations" and "to inspect" such facilities and the "records" of its patients (§13.05, 13.07 and 13.09). Providers of services are specifically required to comply with the Mental Hygiene Law, other applicable laws, "and the regulations of the Commissioner" (§13.11(1)).

Next, we can examine the Commissioner's regulations, which are published in Title 14 of the New York Official Compilation of Codes, Rules and Regulations (NYCRR). The regulations in Chapter III, "Public Institutions," apply only to facilities operated by governmental units. But

the regulations in Chapter II, "All Institutions," contain extremely detailed regulations governing almost every aspect of the day-to-day operations of all institutions, including "private" institutions.

Part 82 of Chapter IV, NYCRR, is particularly relevant. That part, which is specifically applicable to "private" agencies (82.2), extensively regulates the "internal" operations of private psychiatric hospitals. Section 82.4 provides that the required operating certificate shall be displayed in a conspicuous place "readily accessible to the public" (emphasis added). That section requires "prior approval by the department" before a certificate holder can initiate specified changes in its plant or program, and requires certificate holders who terminate operations "to preserve the confidentiality of records."

Section 82.5 contains detailed regulations of the "organization and administration" or private facilities.

Section 82.6 contains detailed regulations of the "program" of private facilities, and requires that the patient's record "be available to all professional staff involved in the care or treatment of that person."

Section 82.7 extensively regulates the "staffing" of private facilities, specifying qualifications for staff positions, and requires that "medical recordkeeping shall be under the direction" of persons with specified qualifications.

Finally, and most important, section 82.8 extensively regulates the "records and statistics," or private facilities. Subsection (2), "case records," provides as follows:

> (1) There shall be an individual record for each person admitted to the hospital.
>
> (2) Each case record shall include:
>
> (i) Legal admission documents,
>
> (ii) Identifying information on the individual and his [or her] family,
>
> (iii) Source of referral, date of commencing service and name of staff member carrying overall responsibility for treatment and care,
>
> (iv) Initial, intercurrent and final diagnoses including psychiatric or mental retardation diagnoses in official terminology,
>
> (v) Reports of all diagnostic examinations and evaluations including findings and conclusions,

(vi) Reports of all special studies performed including X-rays, clinical laboratory tests, clinical psycholocial testing, electro-encephalograms, and psychometric tests,

(vii) The individual written plan of care, treatment, and rehabilitation (82.6 [a] [2] above),

(viii) Progress notes written and signed by all staff members having significant participation in the program of treatment and care,

(ix) Summaries of case conferences and special consultations,

(x) Dated and signed prescriptions or orders for all medications with notation of termination dates,

(xi) A closing summary of the course of treatment and care,

(xii) Autopsy findings if an autopsy is performed, and

(xiii) Documentation of any referrals to another agency.

Subsection (a) of this state regulation thus requires Drs. Lipkowitz and Rabiner to compile and maintain precisely the information plaintiffs wish to inspect. Should Gracie Square and Hillside decide not to compile or maintain such records, their operating certificates would be revoked.

Conversely, without an operating certificate, it would have been unlawful for Gracie Square and Hillside to receive psychiatric patients at all, much less compile records about them.

Subsection (b) of this state regulation provides that "patient records shall be safeguarded for confidentiality and be accessible only to authorized persons." Again, defendants are not free to permit anyone they choose to inspect patient records--those records are, by state regulation, "confidential." And it would be a violation of the state regulation, and grounds for cancellation of their operating certificates, for defendants to allow unauthorized persons to inspect patient records. In addition, the recent enactment of §17 of the Public Health Law makes it indisputable that the definition "unauthorized persons" is not, as appellees have argued, a matter of their internal policy, but rather a question of state law.* Thus, even if the only test of state action is whether the action complained of is required by state law, as the hospitals have argued in part, the actions by the hospitals in this case were clearly state action.

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* It is odd that completely independently, the private hospitals have established policies identical to those required by the state.

C. Additional Case Law

There are literally hundreds of "state action" decisions. As Judge Mansfield has observed, "the issue has usually been resolved--almost always in favor of finding state action."* Seidenberg v. McSorleys' Old Ale House, Inc., 317 F.Supp. 593, 597 (S.D.N.Y. 1970). It would be absurd to discuss, much less list, those hundreds of cases, because each was decided on the basis of the particular facts before the court. In some circumstances, as the hospitals have noted, courts have ruled that the acts of private hospitals did not constitute state action. E.g., Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F.Supp. 1020 (S.D.N.Y. 1971). In other circumstances, the acts of private hospitals have been found to constitute state action. E.g., Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir.), cert. den., 376 U.S. 938 (1964); Sams v. Ohio Valley General Hospital Association, 413 F.2d 826 (4th Cir. 1969); Holmes v. Silver Cross Hospital, 340 F.Supp. 125 (N.D. Ill. 1972) (ruling, apparently, that state licensure, coupled with "pervasive regulations" was enough to constitute state action,

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*See, for example, Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968); Adickes v. Kress & Co., 398 U.S. 144 (1970); and Lombard v. Louisiana, 373 U.S. 267 (1963).

whether or not the hospital received Hill-Burton funds); Citta v. Delaware Valley Hospital, 313 F.Supp. 301 (E.D. Pa. 1970); O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir.1973); Chiaffitelli v. Dettmer Hospital, Inc., 437 F.2d 429 (6th Cir. 1971); Meredith v. Allen County War Memorial Hospital Commission, 397 F.2d 33 (6th Cir. 1968); Cypress v. Newport News General and Nonsectarian Hospital Association, 375 F.2d 648 (4th Cir. 1967)(en banc); Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966); Shulman v. Washington Hospital Center, 348 F.2d 70 (D.C. Cir. 1965)(noting possibility of state action but not resolving question); and Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1961) (finding state action even without receipt of Hill-Burton funds).

In Simkins and Sams, the receipt of Hill-Burton funds was a key factor in finding state action. Hillside has received Hill-Burton funds and is receiving federal, state and local grants (affidavit of Robert K. Match, M.D. (A-59-62). The extent of those grants remains to be determined through pre-trial discovery.

Where the line between state action and private action will ultimately be drawn is not clear. It is clear, however, that this Court has been willing to find state

action in circumstances far less compelling than those presented here. In a recent consideration of the issue, for example, this Court has ruled that granting a private charitable foundation "tax-exempt status" may, without more, constitute state action and subject the private foundation to suits under §1983. Jackson v. Statler Foundation, 496 F.2d 623 (2nd Cir., 1974),(a case conveniently ignored by the hospitals). Judge Friendly's dissent indicates that the implications of the decision "are staggering" and may well subject all tax exempt organizations to suit under §1983. Hillside is a "not for profit corporation" (affidavit of Robert K. Match, M.D.). Under Jackson, that fact alone may subject it to suit under §1983.

In Seidenberg v. McSorleys' Old Ale House, supra, Judge Mansfield, in a scholarly opinion, listed several factors present in that case which persuaded him to find state action in the acts of a private tavern. There, as here, the tavern could not operate without a state license; the state directly regulated "various aspects" of the tavern's "day-to-day operations;" the license conferred on the tavern a "significant state-derived economic benefit,"* the tavern

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*This factor applies to Gracie Square, which is a "proprietary hospital" (affidavit of defendant Lipkowitz).

had to apply periodically for "renewal of its license," it was required "to maintain detailed records, and its premises may be inspected and visited" by state officials; the tavern was required to "display its state license" to the public; and finally, the tavern was not a membership corporation, but was "open to the public."

From the foregoing it is evident, even on the basis of the limited fact record presently before the court, that the state involvement in this case, both generally and with regard to the compilation and dissemination of patient records, is sufficiently extensive to constitute state action.

III. SUMMARY JUDGMENT WAS NOT APPROPRIATE SINCE THERE WERE IN DISPUTE GENUINE ISSUES OF MATERIAL FACT.

A. The Nature Of The Hospitals' Policies Concerning Access By Former Patients To Their Own Records Is In Dispute.

The hospitals argue that the existence of a medical screening mechanism cannot be a factual issue until Janet Gotkin has asked Commissioner Miller to have her physician review her records and he has refused that request. However, no one (except Dr. Rabiner) even mentioned this medical screening mechanism until after Janet Gotkin filed this action. Moreover, the regulation on which the state hospitals rely was not instituted until after Janet Gotkin filed this action. See Brief for Appellees, p. 15. Other members of the class herein have tried to obtain their records through the medical screening mechanism and the hospitals have refused. A-38.

The state hospitals, in an attempt to influence the course of this litigation, have formulated this medical screening mechanism for the purposes of this case. Such a change in policy, even if genuine, cannot make this case moot. See e.g., United States v. W.T. Grant Co., 345 U.S. 629 (1953)*

"it is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption. 97 L.Ed at 1309, f.5, quoting United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952).

Appellants continue to assert that the medical screening mechanism does not exist. This factual dispute must be resolved by the trial court. Thus, summary judgment was inappropriate.

B. The Merits Of The Hospitals' Interests In Refusing To Grant Former Mental Patients Access to Their Records Versus the Merits of Former Patients' Interests In Such Access Is In Dispute.

The hospitals assert that this factual dispute is irrelevant to the issues of this case. Brief for Defendants-Appellees Charles J. Rabiner and Long Island Jewish-Hillside Medical Center, p. 34. Yet, the hospitals have requested the Hospital Association of New York State to participate as amicus curiae in this case precisely to rebut the factual assertions on this point made by the Gotkins. Amicus curiae has submitted over 500 pages of argument on this point. The interests of the hospitals in having amicus curiae enter this case to brief these issues and the dispute between amicus and Janet Gotkin on the substance of the factual issues is the very best proof of the existence of a factual dispute and its materiality to the resolution of this case.

The hospitals have consistently refused to give Janet Gotkin access to any portions of her hospital records. They have not given her the dates of her hospitalization, the names of her treating physicians, nor any other information which, if disclosed to her, clearly could not raise any of the problems suggested by amicus curiae. The hospitals' refusal to turn over even this harmless, non-controversial information suggests that the fears of amicus curiae are a manufactured response to this litigation, and not a serious concern by the hospitals.

Moreover, in citing five possible reasons why access should be denied, amicus curiae does not anywhere claim that any of those reasons apply to Janet Gotkin's records. Apparently no one has even looked at her records. Instead amicus, in its policy argument (Brief of Amicus Curiae, Point I, pp. 5-31), offers this Court 26 pages riddled with "might," "maybe," "perhaps," and "what if." Similarly, Addendum of Amicus offers over 500 pages of "in general," "frequently," "sometimes," and "I think." As courts have often held, such speculations are insufficient to deny constitutional rights. Brief for Appellants, p. 56*

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*And, the United States Congress, in clarifying the right of all students of access to their school records, including psychological and psychiatric records, has haeld that the specific fears raised by the hospitals in this case are without merit. Brief for Appellants, p. 18, fn.**

Finally, Janet Gotkin and Paul Gotkin have raised these issues because the nature of the due process safeguards which must attach in this case depends upon a weighing of the interests involved. Such a balancing cannot be performed until the factual bases for the fears raised by amicus curiae are tested in the trial court. The Gotkins have conceded arguendo that there could be circumstances (occurring extremely rarely) under which a portion of an individual's record should not be disclosed to that individual. And, the hospitals, in advancing a medical screening mechanism and in debating these factual issues at length, have apparently conceded that there are at least some portions of her record to which Janet Gotkin is entitled. The real issue in this case is the determination of who will decide under what circumstances Janet Gotkin will be deprived of her constitutional right of access to her records. Appellants assert that even the medical screening mechanism now advanced by the hospitals is unconstitutional since it is based on the factual arguments advanced by amicus, arguments which appellants have shown are without merit.

Only by exploring carefully the factual support for the speculations raised by amicus curiae and the hospitals can this difficult issue be resolved. Such an exploration, must,of course,be made by the trial court, and thus this case should be remanded for that purpose.

CONCLUSION

For the reasons above, appellants respectfully ask the Court to reverse the District Court's order granting summary judgment, and to remand for a full and complete exploration of the facts.

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*Counsel gratefully acknowledge the assistance provided by Deborah Stead, legal assistant at the Mental Health Law Project.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Deborah J. Stead , being duly sworn, deposes and says, that on the 17th day of December , 1974, she served the annexed:

REPLY BRIEF FOR APPELLANTS

upon

See attached list

Attorney(s) for Appellees , by depositing TWO (2) true copies thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York, in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at:

Deborah J. Stead

Sworn to before me this
17 day of Dec., 1973

Wayne S. Braverman

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